UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

COMMUNITY MEDICAL CENTER

and

Cases 4-CA-34888 4-CA-35025 4-RC-21199¹

NEW YORK STATE NURSES ASSOCIATION

Randy M. Girer, Esq., of Philadelphia, PA, for the General Counsel.

Hope A. Pordy, Esq., of New York, NY, for the Charging Party-Petitioner.

Francis A. Mastro, Esq., and Maurice J. Nelligan, Jr., Esq., of Liberty Corner, NJ, for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on August 13 through 15, 2007², October 1 through 4, October 22 through 25, November 13 through 15 and December 3, in Philadelphia, Pennsylvania, pursuant to a Complaint and Notice of Hearing (the complaint), issued by the Regional Director for Region 4 of the National Labor

¹ By Order and Amendment to Notice of Hearing on Objections to Election dated August 13, 2007, the Regional Director consolidated for hearing the subject case with unfair labor practice cases 4-CA-34888 and 4-CA-35025. After the opening of the hearing on August 13, 2007, I approved an informal settlement agreement in the form of a consent order with the Respondent that remedied all of the outstanding unfair labor practices alleged in both complaints over the objection of the General Counsel and the Charging Party. My rationale for doing so is set forth in the transcript at pages 40-53. Thereafter, upon motion of the Respondent, I severed the unfair labor practice cases from the objections case and informed the parties that I would not permit the General Counsel and the Petitioner to present evidence concerning the settled unfair labor practice allegations in the hearing on objections. Additionally, I rejected the General Counsel's Offer of Proof concerning the unfair labor practice conduct alleged in both cases. On August 14 and 29, 2007, the General Counsel and the Charging Party/Union filed Special Appeals with the Board challenging my approval of the Informal Settlement Agreement, severing the unfair labor practice cases and refusing the admission of evidence concerning the settled unfair labor practice allegations in the hearing on objections. By Order dated September 28, 2007, the Board set aside the settlement, reversed my related evidentiary rulings, and remanded the case for further proceedings consistent with their ruling (GC Exh. 1 (nn).

² All dates are in 2007 unless otherwise indicated.

Relations Board (the Board). In addition, Region 4 ordered consolidated certain issues arising from the representation election in Case 4-RC-21199. The complaint, based upon charges filed in Cases 4-CA- 34888 and 35025 by New York State Nurses Association (the Charging Party or Union) alleges that Community Medical Center (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act).

The Regional Director for Region 4 ordered the consolidation of the above cases for hearing before an administrative law judge. The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

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The complaint alleges Section 8(a)(1) allegations of the Act in that the Respondent directed representatives of the Union to retrieve their vehicles from its parking garage while permitting other persons and entities to park in the garage, coerced an employee by telling the employee that it would put tape on the employee's mouth to discourage her from engaging in union activity, promised improved terms and conditions of employment to employees to discourage them from selecting the Union as their collective-bargaining representative, and failed to notify employees that the Respondent hired a former union organizer without providing assurances that any information received from the former union organizer would not be used against the employees.

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and the Respondent, I make the following

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Findings of Fact

I. Jurisdiction

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The Respondent is a corporation engaged in the operation of an acute-care hospital in Toms River, New Jersey, where it annually derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the State of New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

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The Employer's facility consists of a 600 bed acute care hospital along with numerous buildings and various other departments staffed by approximately 800 registered nurses. The highest ranking manager at the hospital is Executive Director Mark Pilla. The Employer's operation is divided into eight Divisions, each run by a Vice President who reports to Pilla.

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The majority of the registered nurses in the petitioned for unit are assigned to the Patient Care Services Division, that was headed by Vice President Lauren Burke during the critical period. Five Administrative Directors report to Burke. Beneath the Administrative Directors are 27 Directors and 54 Assistant Directors who supervise the units.

Included in the Employer's facility, just inside the main entrance, is a 24-hour coffee shop that is open to the general public. The coffee shop has an L shape. Along the other wall there are several tables that line a long horizontal window that extends the length of the coffee shop, and overlooks an access road and a courtyard. Customers who are seated in booths next to the window have an unobstructed view across the courtyard to hallway one West. Likewise, individuals who are standing in hallway one West can view and identify individuals who are sitting in the booths along the window.

The Petitioner commenced its first organizing campaign in 2004-2005 but it proved unsuccessful. The Union did not file objections to the conduct of the March 2005 election pursuant to an agreement with the Employer. The Union's organizers for the first election campaign included Lisa Ruiz, Keith Peraino and Susan Rosen among others.³ Ruiz was the lead union organizer for the second organizing campaign that commenced in March 2006, assisted by Barbara Conklin, Sunny Barana and Peraino until his resignation from the Union in August 2006. The organizers typically wore red jackets with a Union emblem that was readily identifiable.

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In both Union organizing campaigns, a number of the registered nurses served on the organizing committee and met on a weekly basis. Normally, after working their 7 a.m. to 7 p.m. shift, members of the organizing committee would work in pairs to distribute campaign literature to employee lounges in the respective work units. In addition to wearing their hospital identification badges, members of the organizing committee wore Union buttons. They routinely distributed Union authorization cards, wristbands and water bottles, and staffed informational tables and solicited co-workers to support the Union. There is no dispute that the Employer was aware of the identity of the employee Union organizers because a newsletter with their names and pictures was widely distributed throughout the Hospital in August 2006 (GC Exh. 61).

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The Employer hired outside consultants to oppose the Union's organizing campaign and they worked in an office on the first floor one west hallway that was referred to as the "war room". By letter dated October 3, 2006, Pilla apprised all employees that consultants had been hired and would be meeting with them to explain how collective bargaining works.⁴ The letter also informed employees that the Employer was of the opinion that they would be better off without a union (Pet Exh. 3).

B. The 8(a)(1) Violations in Complaint 4-CA-34888

1. Allegations concerning the parking garage

The General Counsel alleges in paragraph 5 of the complaint that on August 30 and 31, 2006, the Respondent directed Union representatives to retrieve their vehicles from its parking garage and to leave the garage despite the fact that it permitted other persons and entities,

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³ Peraino and Rosen were paid union organizers who worked on the first and second Union organizing campaigns at the Employer. Rosen previously worked for the Union from May 22, 2001 until June 13, 2005. By letters dated July 7, 2006, both Peraino and Rosen were offered positions in the Employer's human resources department. Both individuals accepted the offers of employment and once employed actively engaged in the Employer's campaign to oppose the Union (Pet Exh. 4 and 5).

⁴ The name of the consulting firm is Yessin and Associates, LLC. The principal of the firm is Brent Yessin who was assisted in the Employer anti-union campaign by James Strong and Jose Salgado along with other consultants.

including Wachovia Securities, to park in the garage, that prior to August 30, 2006, it had permitted Union representatives who were entering the coffee shop in the Hospital to park in the garage, and it also took the action because the Union began a new attempt to organize certain of Respondent's employees.

a. Facts

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During the first organizing campaign, Union organizers parked their vehicles in the Employer's visitors' garage and at a strip mall across from the Hospital without incident. There were no agreements either oral or in writing that restricted the Union organizers from parking in the garage and no Union organizer was directed to remove their vehicle from the parking garage. During the second organizing campaign that commenced in March 2006, Union organizers including Peraino, Ruiz, and Conklin routinely parked their vehicles in the Employer's garage. Indeed, Ruiz testified that security guards posted at the garage would regularly waive and say hello to her as she entered the facility to park. Both Ruiz and Conklin were not directed to remove their vehicles from the garage until August 30, 2006, the date that the representation petition was filed.⁵

On August 30, 2006, after distributing campaign flyers to organizing committee members, Ruiz went to the coffee shop as was her normal practice. In early afternoon, a security guard approached Ruiz and asked if she was with the Union. The guard told Ruiz that she had to move her car and could no longer park in the garage. Ruiz inquired who had ordered this and the guard stated that he did not know but that someone in administration gave him those instructions. A short time later, the guard returned to the coffee shop accompanied by Employer Vice President Frank Gelormini. He told Ruiz that she had to move her car, and if she did not that the car would be towed, or that the police would ticket her car. After discussing the matter further with Gelormini, Ruiz removed her vehicle and did not park again in the garage.

On August 31, 2006, the employee Union organizers distributed flyers at the Hospital and then a number of them including Linda Gural joined Ruiz and Conklin in the coffee shop.

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Gural saw Rosen through the coffee shop window walking with two security guards in the direction of the visitors parking garage. Shortly thereafter, Rosen reappeared in the window as she walked toward the Hospital entrance accompanied by the two guards. One of the guards entered the coffee shop and approached the Union booth. He asked, "If we were the Union people". The guard then asked if anyone was driving a white Solara. Conklin identified the Solara as her car. The guard then informed Conklin that she was not allowed to park in the garage anymore and if the car was not removed, it would be towed. Conklin said that other individuals park in the garage and that this was disparate treatment. The guard replied that he had been instructed to tell the Union organizers to move their cars, and if they did not, then they would be towed. After further discussion, Conklin complied and removed her car from the parking garage. The interchange between the guard and the Union organizers was observed by nurses who were also in the coffee shop and at the next Union organizing meeting Ruiz informed all those in attendance what had occurred regarding herself and Conklin.

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⁵ Ruiz saw Peraino at the Hospital for the first time on August 30, 2006. Peraino told Ruiz that he was there to meet with Burke and commence his employee orientation. He added that he would primarily be working on the Shared Governance project.

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Gelormini testified that Assistant Director of Security Tom Moore informed him on August 30, 2006, that the Union organizers were parking in the visitors parking garage. In addition, on the same day, Rosen also told him that Union organizers were parking in the garage.

Gelormini noted that the garage has a capacity for approximately 400 cars and the first floor and lower level is reserved for physicians. In addition, the garage is available for use by patients, visitors, and vendors who have business at the Hospital. During the month of August 2006, the garage was undergoing renovations and during the construction process approximately 100 parking spaces were cordoned off and not available for parking. Gelormini testified that since he assumed his position in 1999, he has never asked anyone to remove their car from the visitors parking garage other then on August 30, 2006.

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Director of Security Anthony Plinio testified that between March and June 2006, he stationed a guard at the visitors parking garage on a regular basis to insure that proper individuals entered the garage.⁶ He also noted that while there was an informal agreement in the first election campaign that the Union organizers would park in the strip mall across the street from the Hospital, there was no such agreement for the second election campaign. He further confirmed that there are no written rules or signs posted in the garage or inside the Hospital that prohibit visitors who are using the coffee shop or the ATM machine inside the Hospital from parking in the garage.

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b. Discussion

The General Counsel first argues that the Respondent directed the Union organizer's vehicles be removed from the parking garage, notwithstanding that it permitted other entities, including Wachovia Securities, to park in the garage.

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The evidence discloses that the Respondent has a primary business relationship with Wachovia Bank that generates yearly fees paid by the Employer to the Bank in excess of one million dollars. Accordingly, and in consideration of this business relationship, the Bank has provided employees of Saint Barnabas Health Care System the right to maintain a payroll direct deposit account with numerous benefits not provided to the general public (GC Exh. 62). While the Respondent does not pay Wachovia directly for this benefit, it is obvious that these accounts would not be made available to its employees absent the Respondent's long standing business relationship and the substantial fees that the Bank generates.

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Human Resources Manager Mariann Pouso testified that the Bank has been provided the opportunity to have a table set up outside the Hospital cafeteria on a monthly basis but she is unaware of the location where the Bank representatives park their cars. Pouso also testified that representatives of Wachovia Securities have been permitted to set up tables at the Hospital on five or six occasions since 2005 to attend benefit fairs and luncheons for the purpose of introducing its numerous financial products to employees. Pouso is not aware of the location that the Wachovia Securities representative's have parked their cars after December 2006, the time that Human Resources moved into the main facility. Prior to that time, representatives of Wachovia Bank and Securities parked their cars in the Riverwood II garage, a leased building on the Employer campus where Hospital and private doctor offices are located and the Human

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⁶ The guards are under Plinio's overall supervision. A discussion of there agency status is found later in the Decision. Plinio further testified that after June 2006, due to manpower shortages, he no longer had daily coverage at the garage. Rather, he had guards make periodic rounds at the garage.

Resources department was previously housed. Pouso also noted that representatives of Hyatt Legal Services and Wellquest (fitness discount under the Employer's health plan) have attended the yearly benefit fair held in the Hospital auditorium but the Employer pays no fees directly to them and she has no knowledge where the representatives park. Pouso further testified that representatives of telephone companies have not been at the facility since sometime in 2003.

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Based on the forgoing, I conclude that the General Counsel has not presented conclusive evidence to sustain the first part of there argument particularly noting that they have not established that representatives of the above companies parked in the visitors garage.7 Moreover, as it concerns Wachovia Bank and Securities, even if the General Counsel had been able to establish that they parked in the garage when visiting the facility. I find that special circumstances exist that would have privileged there parking in the garage. In this regard, while the Respondent does not pay directly for there services, the emoluments provided to its employees would not have otherwise occurred but for the large fees generated from the business relationship. In these circumstances, I find that the Bank falls within the exception for nonemployee solicitations related to employees' benefits. Likewise, I do not find that the limited number of times that Hyatt Legal Services, Wellquest or other entities might have parked in the garage when compared to the almost weekly use by the Union organizers gives rise to disparate treatment. Therefore, I reject the General Counsel's argument that the Union organizers were directed to remove their vehicles from the garage based on disparate treatment when compared to other entities. See, Lucile Salter Packard Children's Hospital v. NLRB, 97 F.3d 583, 587-589 (D.C. Cir. 1996) ("no violation of section 8(a)(1) occurs if the solicitations approved by the employer relate to the employer's business functions and purposes," including informational solicitations relating to benefits that are part of employees' regular benefit package).

With respect to the General Counsel's position that Union organizers have parked in the garage on numerous occasions when visiting the coffee shop prior to August 30, 2006, and because the Union began a new attempt to organize certain of Respondent's employees, I find merit to these arguments based on the following reasons.

The record discloses that Union organizers Ruiz and Conklin parked in the visitors parking garage continually between March and August 2006, when visiting the coffee shop. Indeed, when the security guard was posted in the garage from March to June 2006, he would waive and say hello to Ruiz as she entered the parking facility and no attempt was made to prohibit her from parking in the garage. While the Respondent opines that the Union organizers were directed to remove their cars from the garage because they were not visitors to the Hospital and due to ongoing construction during the month of August 2006 that limited the number of parking spaces available for physicians, patients and visitors, that argument does not withstand scrutiny. In this regard, even during the construction period, the Union organizers were parking in the garage without incident and the Respondent introduced no evidence that

⁷ Richard Scialabba has visited the Hospital five or six times a year since 2005 in his capacity as a financial advisor for Wachovia Securities to conduct educational seminars on retirement planning for employees. He has parked his personal vehicle for these hour long seminars in the Riverwood II parking garage and has never had any conversations with the Respondent as to where to park or not park his vehicle. He testified, however, that he never parked in the visitors parking garage.

⁸ There is no question that the Respondent knew that the Union organizers were parking in the parking garage. In this regard, Plinio testified to this effect and Gelormini admitted that he "assumed" that the organizers were parking in the garage.

visitors to the parking garage were turned away for lack of parking spaces. Second, at no time prior to the directive to remove their vehicles, did the Respondent enter into any discussions with the Union organizers to find other alternatives to there perceived parking shortfall or rationale for excluding them from parking in the garage. Third, the Respondent has no rules or policies against individuals parking in the garage when visiting the coffee shop or the ATM machine inside the Hospital. Likewise, the Respondent admits that no signs are posted in the garage, in the coffee shop or inside the Hospital that prohibits visitors to the coffee shop from parking in the garage. Fourth, Gelormini admitted that since he assumed his position in 1999, he has never asked anyone to remove their car from the garage other then on August 30, 2006.

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I also note that it was more then a coincidence that the Union organizers were directed to remove their vehicles on the same date that the representation petition was filed and a flyer announcing the event was widely distributed at the Hospital (GC Exh. 73). Moreover, the date that this occurred was also the first time that Ruiz observed Peraino at the facility and he was intimately familiar with the type of cars that Ruiz and Conklin drove. Additionally, Gelormini testified that Rosen informed him on August 30, 2006, that the Union organizers were parking in the garage and on the following day, Rosen was seen in conversation with the guards heading in the direction of the parking garage and then returning to the main entrance with the guards. It was shortly thereafter that one of the security guards went into the coffee shop and inquired if Ruiz and Conklin were the Union people and who was the driver of a white Solara. Lastly, as Conklin left the coffee shop to remove her vehicle from the garage, she observed Rosen sitting in a security vehicle in front of the Hospital.

For all of the above reasons, and particularly noting the events that occurred on August 30 and 31, 2006 involving Gelormini, Rosen, Peraino, and the security guards all of whom are agents of the Employer (see discussion below), I find that the Respondent engaged in conduct violative of Section 8(a)(1) of the Act when it directed Ruiz and Conklin to remove their cars from the parking garage.

C. The 8(a)(1) Violations in Complaint 4-CA-35025

1. Allegations concerning Keith Peraino

The General Counsel alleges in paragraph 5 of the complaint that at the end of August 2006, a more precise date being unknown to the General Counsel, Respondent hired Peraino and assigned him to its campaign in response to the Union without providing assurances to employees that Peraino's knowledge of who supported the Union would not be used against them. On November 15, during the course of the hearing, the General Counsel amended the complaint to now state that Peraino was hired on or about July 19, 2006 (GC Exh. 1 (pp).9)

a. Facts

Peraino commenced working for the Union in 1999 and assisted them in their organizing efforts during both election campaigns. He regularly attended Union meetings with the employee organizers including those that occurred after he gave notice to the Union that he

⁹ The General Counsel's also moved to Amend the Complaint to reflect that on or about July 19, 2006, and continuing until on or about August 8, 2006, Respondent, by Keith Peraino, engaged in surveillance of Respondent's employees' union activities. For the reasons stated on the record and particularly noting that Region 4 previously dismissed the identical allegation, I denied the Motion (R Exh. 1).

would be leaving their employ. He also helped prepare campaign literature, set up and run information tables at the Hospital and was intricately involved in the strategy and planning to convince employees of the benefits to select the Union as their collective-bargaining representative (GC Exh. 50 and 51). Peraino was in possession of, and had access to the names of all employees who supported the Union and received signed authorization cards that were given to him by employee Union organizers.

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Peraino interviewed for a job with the Employer in or around June 2006¹⁰ and was formally offered a position as a labor relations consultant with the Saint Barnabas Health Care System on July 7, 2006. Peraino signed numerous employment related documents on July 19, 2006. He gave the Union two-weeks notice and officially left their employ on August 8, 2006. commencing work with the Employer on August 21, 2006. At the time of his resignation, he told Union representatives that he would be working in human resources for a hospital in Bethlehem, Pennsylvania, unaffiliated with the Saint Barnabas Health Care System. In or around mid-August 2006 Peraino telephoned Registered Nurse Helen Hucker, an employee Union organizer, to apprise her that his status had changed and he was now working as a consultant for the Saint Barnabas Health Care System. He assured Hucker that while she might see him at the hospital, he would not be working on the election campaign but rather would be engaged on a project known as Shared Governance, a concept that would be beneficial for the nurses. 11 Peraino, on August 24, 2006, made a similar telephone call to Union organizer Gural. She recorded the message and subsequently made a verbatim transcript (GC Exh. 26). Thereafter, at an organizing committee meeting held in September 2006, Gural played the cell phone recording for those in attendance. The other employee nurse organizers in attendance were upset when they heard the telephone message as by then, they had observed Peraino in the hospital actively working on the Employer's campaign against the Union. When the Union officially learned that Peraino was working for the Employer and was assigned to the campaign against the Union, it reviewed his file to determine what information still remained in his possession. The Union believed that Peraino retained Union documents such as signed authorization cards, organizing documents including flyers and detailed strategy memoranda with lists of employees who supported the Union. The majority of the staff nurses at the facility learned after the election petition was filed on August 30, 2006, that Peraino was now working at the facility in the campaign against the Union and he remained in that capacity through the January 11 election.

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Peraino admitted that after he commenced employment with the Employer that he was actively involved in the training of management representatives in what they could do and say during the election campaign and along with Rosen participated in meetings to encourage employees not to select the Union as their bargaining representative. He also acknowledged preparing handouts and campaign literature that urged employees not to select the Union as their collective bargaining representative and was actively engaged along with Rosen in convincing employees to embrace the concept of Shared Governance instead of the Union.

¹⁰ During this meeting, Vice President of Human Resources Sidney Seligman made it abundantly clear that if Peraino accepted an offer of employment his primary responsibility would be working on the campaign against the Union.

¹¹ In June or July 2006, according to Ruiz, Irene Merlin, Teresa Wiencke, and Regina Smith, Peraino informed Union organizers at a meeting held at the Quality Inn Hotel that the only way the Hospital could counter Union activity was by the introduction of Shared Governance. It was a way of organizing without having a union because the nurses would have a greater say in their working conditions.

b. Discussion

In addressing this allegation, I note that the Respondent argues that any actions undertaken by Peraino prior to his employment in August 2006 cannot be attributed to them and is barred by Section 10(b) of the Act.

The evidence discloses that Peraino withheld critical information from the Union before he tendered his resignation in July 2006. For example, he first told the organizers that he was leaving the Union's employ to accept a job with a hospital in Bethlehem, Pennsylvania, that was not part of the Saint Barnabas Health Care System. He then informed Hucker and Gural in August 2006, that his employment status had changed and he had accepted a position with Saint Barnabas Health Care System. Peraino assured them that his responsibilities would be in the area of special projects including working on the Shared Governance concept but he would not be working on the election campaign against the Union. This information was also false since as a condition of accepting his position with the Respondent, he was specifically hired to work on the campaign against the Union. Moreover, the Respondent admits in its answer that Peraino was assigned to the Hospital to assist in its response to the effort of the Union to organize its employees. The Union did not become aware of his presence at the Hospital and his role in the election campaign until late August 2006 when Ruiz met him at the Hospital.¹² Even then, Peraino still insisted that he was working on Shared Governance and did not reveal to Ruiz that he would be working on the election campaign. Peraino admitted that after he gave notice to the Union but before he left there employ, he attended internal strategy meetings, met with nurses on the organizing committee, and openly interviewed nurses about their feelings towards the Union. It is undisputed that he was privy to the Union's most sensitive information involving the names of nurses who had signed authorization cards, nurses who supported the Employer and nurses who were neutral and could tip the results of the election. Thus, Peraino was in possession of information that could be used to influence the results of the election on behalf of the Employer. There is no question, once his status became open and notorious, that members of the Union organizing committee became concerned about there own vulnerability and felt betrayed. Likewise, it is reasonable to conclude that nurses who were undecided about their position would internalize that if Peraino made the switch during the midst of the campaign there must be compelling reasons that caused his disaffection and this could have impacted their voting decision.

The seminal question presented is whether Peraino was aligned with the Employer, and acted in their interest, while engaged in union-related activities or discussions with employees. In my opinion, an employer may not take advantage of actions carried on in its behalf by not informing its employees that any information in its possession concerning activities on behalf of the Union will not be used against them. Here, Peraino had extensive knowledge of employees' union activities between the time he accepted employment (July 7, 2006) and his actual start date (August 21, 2006) in addition to possessing such information after he commenced working on the campaign against the Union (GC Exh. 98 through 123). The evidence further discloses that Peraino attended a number of employee meetings in September and October 2006, where he advocated against the Union and supported the concept of Shared Governance.

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¹² Under these circumstances, the Respondents Section 10(b) defense is without merit. Once the Union became aware of Peraino's covert activities, the underlying charge and amended charge were filed within six months of that knowledge. *Paul Mueller Company*, 337 NLRB 764 (2002), *Browne & Sharpe Mfg. Co.*, 312 NLRB 444 (1993).

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Based on the forgoing, and particularly noting that the Employer has admitted it never provided assurances to employees that Peraino's knowledge and support of the Union would not be used against them, I find that such actions were coercive and intimidating to employees in violation of their Section 7 rights. Therefore, by refusing to notify employees that such knowledge would not be used against them, the Respondent has violated Section 8(a)(1) of the Act. 13

2. Allegations concerning Susan Rosen

The General Counsel initially alleged in paragraph 6 of the complaint that on or about September 25, 2006, Respondent by Susan Rosen, near the Admissions office at the Medical Center, threatened an employee with physical harm to discourage the employee from engaging in Union activity. On November 14, during the course of the hearing, the General Counsel amended the complaint to state that on September 25, 2006, Respondent, by Susan Rosen, near the Operating Room at the Medical Center coerced an employee by telling the employee that Rosen would put tape on the employee's mouth to discourage the employee from engaging in union activity (GC Exh. 1 (oo)).

15 a. Facts

Teresa Wiencke is a nurse in the Operating Room and is a member of the Union's organizing committee.

Wiencke met Rosen in August 2006, at a luncheon held in the operating room. Rosen introduced herself to Wiencke and inquired whether she understood the implications of bringing a Union into the Hospital. Thereafter, at a second meeting held on work time in early September 2006 with Rosen and Burke that lasted over one hour, Rosen solicited Wiencke to serve on the Shared Governance committee. Wiencke declined the offer stating it would be a conflict of interest.

On September 25, 2006, Wiencke was walking on the first floor from the Operating Room toward the administration office to get patient labels. As she was passing through the reception area she saw Rosen and Peraino, exiting the administration office. As they approached each other, Rosen called Wiencke's name and threw her arms up and embraced her. According to Rosen, Wiencke initiated the greeting and gave her a hug and a kiss on the cheek.

Wiencke obtained the labels from the administration office and started walking back to the operating room. She again met Rosen and Peraino in the hallway leading to the operating room. They slowed down to wait for Wiencke to catch up and as she walked, Rosen and Peraino walked beside her. Rosen took Wiencke's left arm in a two-armed grip, and walked closely next to her. Peraino walked alongside on Wiencke's right but never touched her. Rosen asked Wiencke what is going on. Wiencke said that she was afraid. They said why. Wiencke said, because I'm afraid that you are going to take me into the men's room and beat the crap out of me. They both laughed and said no. Rosen said, "We're just going to put tape on your mouth." According to Rosen, Wiencke caught up with them in the hallway and linked arms with

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¹³ Although not exactly on point, the Board's cases in *Airborne Freight Corp.*, 263 NLRB 1376, 1383-84 (1982) and *Comcast Cablevision*, 313 NLRB 220, 251 (1993) are instructive. In both cases the Board found in offering and promoting a pro-union employee the respondents violated Section 8(a)(1) of the Act because it was an attempt to dilute the union's support and a method to demoralize other employees with the result of ensuring defection from the union's ranks.

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Peraino and Rosen and said, now that I am in the middle of you both, what are you going to do to me? Rosen replied, I don't know, should we duck tape your mouth. As they approached the operating room, Wiencke asked what they were up to, and Rosen stated "We are busting Union's." Rosen's fist was in the air as she punched it several times and continued to walk down the hallway. Rosen denied that she ever made the comment we are busting Union's.

5 b. Discussion

On September 27, 2006, Wiencke prepared a written statement summarizing what occurred when she met Rosen and Peraino in the hallway on the way back to the Operating Room (GC Exh. 96). This statement conflicts with her testimony in several areas. For example. Wiencke never states that she felt threatened or that she was placed in harms way as a result of the confrontation. Rather, Wiencke explains that when she told Rosen and Peraino that she was "afraid" the statement was made because she did not want to make a scene or pull away because it could have caused Rosen to fall due to her wearing high heals. Moreover, when Wiencke stated that Rosen and Peraino would take her into the men's room and beat the crap out of her, they both answered, "no". Wiencke concluded her statement by indicating that the whole confrontation might have taken 20 seconds and while she felt uncomfortable, she did not chastise their unnecessary closeness because she was embarrassed. Moreover, Wiencke admitted that she did not report the incident to her supervisor on the day it occurred, never filed an incident or police report and did not report the matter to security at the Hospital. Rather, Wiencke admitted that she went back to work and completed her shift. While Wiencke testified that on the day of the incident she told some of her co-workers in the operating room what had occurred to help her determine if she was threatened, her statement given on September 27, 2006, does not mention or specifically state that she was coerced in any manner or threatened with physical harm.¹⁴ As it concerns the statement made by Rosen that we're just going to put tape on your mouth. Wiencke acknowledged that she did not observe any tape in their hands and did not think they would actually do that. Rather, Wiencke interrupted the comment to mean that they wanted her to keep quiet. In regard to Rosen's statement about busting Unions, I do not subscribe a coercive motive but rather would characterize it as a flippant comment made during the moment in response to a question raised by Wiencke.

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Therefore, based on the September 27, 2006 statement that was prepared shortly after the events in question, and particularly noting that Wiencke did not mention that she felt threatened or coerced but characterized her feelings as being embarrassed, I do not find that the General Counsel has sustained this allegation of the complaint. While the actions of Rosen and Peraino could be characterized as unprofessional, and indeed Pilla apologized to Wiencke in a meeting held on October 11, 2006, they do not raise to the level of Section 8(a)(1) conduct under the Act. Therefore, I recommend that the allegations in paragraph 6 of the complaint be dismissed.

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¹⁴ Pouso credibly testified that she met independently with Wiencke on October 6, 2006, to investigate the alleged confrontation with Rosen and Peraino. During that meeting, in which she took notes (GC Exh. 87), Wiencke stated that if I felt assaulted, I would have done something and I don't understand why we are looking into this or why we are making a big deal about this. Wienke told Pouso that she had expected to meet Pilla about a letter that he had sent to all of the nurses regarding the Union campaign and she was adamant about talking about the letter rather then the incident with Rosen.

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3. Allegations concerning surveillance

The General Counsel alleges in paragraph 7 of the complaint that on or about October 3, 2006, Respondent by Christopher O'Connor, or by security guards whose names are unknown to the General Counsel, followed and surveilled an off-duty employee who was distributing Union water bottles to non-patient care lounges at the Medical Center notwithstanding that off-duty employees previously had been given access to the lounges. At the commencement of the hearing on December 3, the Charging Party moved to withdrew this allegation due to the unavailability of its witness who would have testified concerning this allegation. Since none of the parties objected to the motion, I approved on the record the withdrawal of paragraph 7 of the complaint. Accordingly, I have not made a finding concerning these allegations.

4. Allegations concerning Lauren Burke

The General Counsel alleges in paragraph 8 of the complaint that on or about October 18, 2006, Respondent, by Vice President Lauren Burke, at a meeting with employees at the Medical Center, by introducing and describing a shared governance concept, promised its employees improved terms and conditions of employment in order to discourage them from selecting the Union as their collective-bargaining representative.

20 a. Facts

In June or July 2006, according to Ruiz, Merlin, Wiencke, and Regina Smith¹⁵, Peraino informed employee Union organizers at a meeting held at the Quality Inn Hotel that the only way the Hospital could counter Union activity was by the introduction of Shared Governance. It was a way of organizing without having a union because the nurses would have a greater say in their working conditions.

Shared Governance is a concept wherein registered nurses are able to work alongside management to develop better working conditions and practices to ultimately improve patient care. In its simplest form, it is shared decision-making based on the principles of partnership, equity, accountability, and ownership at the point of service. This management process model empowers all members of the healthcare workforce to have a voice in decision-making (GC Exh. 31, 53, 54 and 84). In addition, according to Burke, the concept would enable nurses to do some self scheduling and help staff the department the way they felt was best.

Commencing in July 2006, Burke and Rosen started meeting with individual employee Union organizing committee members to propose the concept of Shared Governance and to encourage them to act as liaisons from their respective Units.

As discussed earlier in the Decision, Peraino telephoned Hucker and Gural in August 2006, to inform them that he along with Rosen would be working on Shared Governance and that Vice President of Nursing for Saint Barnabas Health Care System Nancy Holecek wanted it to work and be implemented.

In July 2006, Rosen came to the intensive care Unit with the Director of the Critical Care

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¹⁵ Smith is a registered nurse in the Emergency Department. She has been employed for approximately ten years and served on the Union's organizing committee in both election campaigns.

Unit Judy Boccellato who introduced Gural to Rosen. Thereafter, Rosen met with Gural in the conference room during duty time and after informing her that she was very influential with the nurses at the Hospital due to her expected elevation to the Presidency of the New Jersey State Nurses Association¹⁶, advocated the concept of Shared Governance stating that it would be a better way to go than unionizing.

In September 2006, Wiencke was called into a meeting with Rosen and Burke and was solicited to become a member of the Shared Governance committee. Wiencke said that she was not interested since it was a conflict of interest with her Union organizing responsibilities.

In September 2006, Rosen and Burke met privately with Hucker. This meeting occurred after she encountered Peraino in the lobby of the Hospital and he told her that the Shared Governance concept would be a good instrument for nurses. He further informed Hucker that Holecek wanted it to work and the Union was not all it was cracked up to be.

Rosen informed Hucker during the hour long meeting held on duty time that Shared Governance would be between the employees and the administration and that it would give nurses a voice in practice issues and permit them to raise their concerns. Rosen and Burke asked Hucker to co-chair the Shared Governance Committee and act as its corporate liaison. Rosen told her that Holecek really wanted it to take off and if the Union came in it could cost Burke her job.¹⁷ Hucker replied that she could not give them an immediate answer as she had a number of personal issues on her plate particularly the deployment of her son to Iraq.

In late September or early October 2006, Burke met with Hucker to discern whether she would accept the position. Hucker told Burke that she had to decline the offer.

Rosen also met with Union Organizing Committee member Smith on three or four occasions to talk about Shared Governance, stating that it would be beneficial for the nurses and they would have a voice in patient care and practices at the Hospital. Rosen also stated in these conversations that the Union was a bad alternative and it would not do anything for you. Rosen also offered Smith a position on the Shared Governance Committee, which she turned down.

On October 18, 2006, the Employer held a registered nurse (RN) lunch and learn meeting to officially communicate the concept of Shared Governance to employees. Prior to that date, the Employer maintained a Professional Practice Council (PPC), as well as other committees, in which nurses took part. The PPC met monthly with Burke serving as its chairperson.

The meeting included patient care directors from the various Units in addition to registered nurses. Burke announced that the Employer was combining the PPC with the Nursing Practice Council and it would be known as the Professional Practice Council.

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¹⁶ On August 1, 2006, Gural was elected President of the New Jersey State Nurses Association.

¹⁷ Burke denied that such a statement was ever made in her presence. However, the weight of the evidence is to the contrary. In this regard, employees Wiencke, Hucker and Seal similarly testified that they were told by Rosen or other managers that Burke would lose her job if the Union came into the facility. Additionally, Rosen did not deny that she made the statement about Burke losing her job if the Union came into the facility.

During the meeting, Burke gave a power point presentation on Shared Governance and at the conclusion of the meeting told nurses that they should ask their co-workers to volunteer for the committee, but if they did not volunteer, then the Unit directors would request employees to serve on the Shared Governance Committee.

Commencing on or about October 18, 2006, the Shared Governance concept was implemented at the Hospital during the critical period.

b. Discussion

Peraino, while still working for the Union, shared his opinion that the Shared Governance concept could be an impediment to organizing the nurses and might be a critical element in the Employer's campaign to oppose the Union.

During the period while Peraino was still employed with the Union, the record shows that he made a number of telephone calls to Rosen either at her home, cell, or work number (GC Exh. 32 and 34). While the Employer argues that the telephone calls could have related to the Legal Nurse Consulting business that they started along with Ruiz, I am quite skeptical of this assertion. In this regard, Peraino testified that since the business was started in 2005, it was never active, never made any money, and was ultimately disbanded in December 2006. Thus, it is reasonable to conclude that the subject matter of these telephone calls concerned issues surrounding Peraino's potential employment with the Respondent, including Rosen's recommendation to Seligman in June 2006 that he be hired, and discussions about the Shared Governance program/Union campaign. The evidence establishes that once employed with the Respondent, Peraino contacted a number of bargaining unit committee members to apprise them that his employment status had changed and he was now working for the Saint Barnabas Health Care System with the primary goal of working on special projects including the Shared Governance concept. He routinely met with employees and specifically informed organizing committee members that the Employer was highly motivated to implement the concept and it was the way to proceed rather then having a Union at the Hospital.

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Likewise, Rosen was a pivotal and visible figure in pushing the concept of Shared Governance and often talked to employees with Burke about the program. She apprised those who she spoke with that the Shared Governance concept was being touted at the highest levels of the Employer and was the best way to proceed rather then having a Union at the facility.

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It is apparent to me that Peraino's opinion that the Shared Governance concept was a tool that could be used to undermine the Union was one of the centerpieces of the Employer's campaign to disabuse employees from selecting the Union as their collective-bargaining representative. While higher level officials of the Employer including Burke and Holecek embraced the Shared Governance concept, it was the actions of Peraino and Rosen that sought to undermine the Union's message by inducing employees to buy into Shared Governance rather then supporting the Union. As part of this campaign, and commencing in July 2006, Rosen and Burke targeted members of the Union's organizing committee in an attempt to flip them from supporting the Union. In this regard, Rosen selected the leadership and those nurses that were highly respected by there peers in an effort to soften support for the Union from within, hoping to persuade the Union organizers to cross-over and bring additional nurses into the fold to support Shared Governance and in effect drop support for the Union.

Since I conclude that Rosen and Peraino were working for and with Burke and Holecek to implement the Shared Governance program, I find that when Burke held the meeting on

October 18, 2006, to announce the implementation of the Shared Governance concept, it was with the express purpose of attempting to persuade and discourage the nurses from selecting the Union as their collective-bargaining representative. Under these circumstances, I find that the Employer engaged in conduct violative of Section 8(a)(1) of the Act. See, *Audubon Regional Medical Center*, 351 NLRB 374, 412 (2000) (employer's announcement during critical period of focus action team composed of nurses and managers that dealt with staff issues violated Section 8(a)(1) of the Act).

III. The Union Objections

Pursuant to a petition filed on August 30, 2006, and a Decision and Direction of Election that issued on December 14, 2006, an election by secret ballot was conducted under the direction and supervision of the Regional Director, Region 4 of the National Labor Relations Board (the Board or NLRB) on January 11, in the following unit of employees.

INCLUDED: All full time, regular part time, and per-diem Registered Nurses, including Charge Nurses, employed by the Employer at the Employer's Toms River, New Jersey locations.

EXCLUDED: The Administrative Director, Administrator for Nursing Services, Assistant Director, Assistant Director for Patient Care, Coordinator-Home Healthcare, Coordinator-Emergency Department, Directors, Director of Patient Care, Executive Director, Intake RN, Manager-Adult Day Care Program, Vice Presidents, Case managers, Licensed Practical Nurses, Nursing Assistants, service and maintenance employees, technical employees and all other employees, guards, and supervisors as defined in the Act.

The tally of ballots, which was made available to the parties at the conclusion of the election showed the following results:

| | Approximate number of eligible voters | 788 |
|----|---|-----|
| 30 | Void ballots | 0 |
| | Votes cast for Petitioner | 316 |
| | Votes cast against participating labor organization | 407 |
| | Valid votes counted | 723 |
| | Challenged Ballots | 9 |
| 35 | Valid votes counted plus challenged ballots | 732 |

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A majority of the valid votes counted plus challenged ballots have not been cast for the Petitioner/Union.

On January 18, the Petitioner filed timely objections to conduct affecting the results of the election. On March 29, the Regional Director issued an initial Report on Objections and Notice of Hearing.

The Petitioner filed Objections 1 through 5 because it asserted that the Employer engaged in conduct that precluded a fair and impartial election particularly noting that employees were surveilled and followed when they distributed union campaign literature in non-patient care areas. Additionally, the Petitioner asserts that their campaign literature was removed by the Employer, representatives of the Employer created the impression that employees activities were under surveillance and the Employer promised benefits to employees on the day of the election.

Objection Number 1

The Petitioner submitted evidence to the Regional Director indicating that on or about January 5, shortly after Union adherents placed flyers in an employee lounge, Employee Relations Manager Susan Rosen went to the lounge and said that she was looking for intruders. An employee than saw a man near the lounge and, when the employee called the Employer's security office to report what she observed, the security office told her that the man was a security guard and that he was in the unit "looking for Union people". Supervisor Christina Reynolds later told the employee that the guard was armed. In further support of Objection 1, Petitioner contends that on or about January 9, Assistant Director of Unit 3A Celina Holden told employees that they were not permitted to put Union literature in the employee lounge.

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a. Facts

Gural is a registered nurse in the intensive care unit and is also a member of the Union's organizing committee. During the period between January 1 and 11, Gural along with fellow Union organizers distributed campaign literature in employee lounges. On January 5, after obtaining Union campaign flyers from Ruiz in the coffee shop, Gural placed a number of flyers in the intensive care unit employee lounge. Around 8 p.m., Nursing Director Judy Boccellato came into the intensive care unit seeking the whereabouts of Gural's supervisor. Although Gural's supervisor was not available, Boccellato was able to obtain the access code for the employee lounge from another registered nurse. Approximately ten minutes after Boccellato left the intensive care unit Gural entered the employee lounge and observed that all of the Union campaign flyers were missing. According to Gural, as she was about to leave. Rosen was punching in the access code to the lounge and appeared with some flyers in her hand accompanied by Burke's son. Rosen informed Gural that she was looking for intruders as it was reported that three teenage girls were causing damage to hospital property. Gural replied that she had not seen any teenagers in the intensive care unit. Gural observed that the papers in Rosen's hand were the same color as the Union flyers but she could not confirm that the documents were the Union flyers.

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Boccellato admitted that on January 5, she asked one of the nurses on the intensive care unit for the access code to the employee lounge, after she learned that her colleague and friend the Director of the unit was unavailable. Boccellato testified that she entered the lounge to use the rest room but did not notice any Union campaign literature. Boccellato denied that she removed any Union literature from the intensive care employee lounge.

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On January 5, around 8:30 p.m., Gural observed a man dressed in a black shirt, jacket and pants walking through the intensive care unit. She observed a hospital identification badge on his jacket and upon inquiry learned that he was a security guard. The guard informed Gural that he was making his rounds on her unit. Since Gural had never observed a guard dressed like this on her unit, and in an abundance of caution, she telephoned the security office after checking the number on a posting that she was instructed to use in case of emergencies. The person who answered the telephone stated this is "security". Gural inquired about the guard dressed in black. The security office official informed Gural that the individual is with corporate security and has been on duty in the emergency room since after September 11, 2001. The security office official then told Gural that the guard was in her unit looking "for Union people". 18 While Gural observed guards dressed in this manner at the Union's rally on January 8, she had

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¹⁸ See, *Union Terminal Warehouse*, 286 NLRB 851, 860 (1987) (guards had apparent authority and were responsible for statements made to employees).

never previously observed a guard dressed like this in her Unit and did not recall any notices from the Employer that new guards had been added to the security force. According to Gural, Nursing Supervisor Christina Reynolds told her that guards dressed in all black uniforms had been in the emergency room since September 2001, were armed, and the guard she saw was looking for "Union persons".

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Gural further testified that in late August or early September 2006, while attempting to distribute flyers in the 5th floor Obstetrics Unit, she was prevented from distributing the literature by the female guard on duty who apprised her after contacting the Director that they did not want any campaign flyers in the Unit. Gural also testified that around this same time, she along with fellow Union organizer Merlin, went into the lounge on Unit 3C using the combination that a staff member had provided and placed flyers in the mailboxes. The Director of Unit 3C, Nancy Jobes, came into the lounge and then left but later confronted Gural and Merlin about how they obtained entry into the employee lounge as it was intended for her staff only. Gural informed Jobes that they had obtained the access code from one of her staff members. Jobes replied that no one other than her staff should have the combination and Merlin told Jobes that the next time we would have a staff member let us in the lounge. Merlin, who joined Gural in distributing Union campaign literature in both the Obstetrics Unit and Unit 3C, testified in the same manner as Gural concerning both incidents. 19 Merlin also noted that she distributed and sold Mary Kay cosmetic products and regularly left her literature in the employee lounges. She testified that the literature was never removed by the Employer nor was she ever instructed not to distribute Mary Kay flyers in the hospital. Merlin also observed Avon product literature distributed in employee lounges and noted that the Employer tolerated the selling of candy bars and other commercial products at the nurse's station and in employee lounges.

Employee Geraldine Seal, a registered nurse at the Employer for over 28 years and presently working in the cardiac rehabilitation unit, testified that she is a member of the Union's organizing committee and served as an observer at the January 11 election.

On January 9, along with registered nurse Sandy Mathis, Seal distributed Union campaign literature after work hours. Both individuals credibly testified that they were wearing hospital identification badges attached to their clothing that was clearly visible. Upon arriving in Unit 3A, Assistant Director Celina Holden, in the presence of other staff members refused permission for them to place campaign literature in the employee lounge. Holden also refused to give them the access code for the employee lounge and stated that she would not allow them to put literature any where on the unit. Seal testified that Holden was wearing a "Vote No" button on her uniform. She told Holden that, under those circumstances, the Union should be able to leave campaign literature in the employee lounge. Upon leaving Unit 3A, Seal and Mathis proceeded to Unit 3C where they were able to place campaign literature in the employee lounge without incident.

According to Reynolds, Gural called security because she observed an individual dressed in all black clothes walking on the intensive care Unit. Reynolds did not observe the guard dressed in dark clothes. Reynolds informed Gural that some of our guards do dress in all black clothes and have been employed by the Hospital since September 2001. Reynolds testified that Gural asked her whether the guards were on the Unit to spy on Union organizers. Reynolds informed Gural that it was routine for the guards to make there rounds in the Units.

¹⁹ Merlin was terminated by the Employer on October 26, 2006. Since her testimony was consistent with fellow employee Gural, I do not subscribe any motive of bias as urged by the Employer.

Holden testified that on January 9, two or three individuals that she did not recognize appeared at the nurses' station in Unit 3A. According to Holden, they were wearing coats and did not display any form of identification. Since the individuals did not establish that they were working and failed to show any hospital identification, Holden refused to provide them the access code to the lounge or to distribute Union campaign literature anywhere on the Unit. Accordingly, Holden requested that the individuals leave the Unit. Holden denied that she was wearing a "Vote No" button on her uniform during the conversation with the unidentified individuals.

Rosen testified that on the evening of January 5, she was having dinner with Burke and her son. Burke received a telephone call that three teenage girls were wandering around the hospital and several paid Union organizers were in the halls. Rosen, along with Burke, returned to the Hospital. Rosen went directly to the intensive care unit along with Burke's son who she wanted as a witness and knocked on the door to the employee lounge because she did not have the access code. Two nurses responded to her knock and Rosen asked the nurses to let her know if they saw any strangers on the Unit. Rosen asserted that she did not enter the employee lounge, did not have anything in her hand other then her purse, and did not remove any Union flyers from the employee lounge. Rosen further testified that she had no contact with Gural on that evening nor did she see or talk with her in the employee lounge.

Jobes testified that the employee lounge on Unit 3C is normally reserved for employees who work in the Unit and for employees who might be assigned to the Unit on a temporary basis. Jobes was informed by some of her staff members that there were people in the back room. Accordingly, Jobes entered the employee lounge and after recognizing Gural asked her how she gained entry. Gural informed Jobes that an employee had previously given her the access code and she wrote it down on a piece of paper. Jobes testified that she made no attempt to remove any Union campaign literature that was placed in the employee lounge that day and during the course of the Union campaign regularly observed that Union literature was left in the Unit 3C lounge without being removed. Jobes informed Gural that she was checking the lounge because a number of her employees were concerned about their personal belongings that were left in the lounge.

Director of Patient Care for Labor and Delivery and Women's Health (Obstetrics Unit) Louise Archetti testified that the entire fifth floor is secure and locked because of the babies and admission to the floor is gained by key pad access only. Normally there are two or three guards stationed on the floor to screen visitors who come onto the Unit. Archetti testified that there was a female security guard assigned to the Unit on or about August 31, 2006, however, she never was informed that two Union organizers sought entry into the Unit to distribute campaign literature in the two employee lounges used by her staff. At no time did Archetti instruct the security personnel to refuse Union organizers admission to the employee lounges and on numerous occasions on dates other then August 31, 2006, she observed Union literature that was left in both employee lounges.

Plinio is a retired police officer who has held his present position for seven years at the Respondent. He supervises a staff of 60 people, 45 of whom are security officers. Two of these security officers are retired police officers that he hired. Plinio requires the two retired police officers to wear dark clothes with a sport jacket that covers a concealed weapon.²⁰ His

²⁰ The two armed security guards dressed in all dark clothes are employed by Major Security. It is an affiliate of the Saint Barnabas Health Care System as is the Employer herein.

regular security officers are dressed in dark pants and white shirts but are not authorized to carry weapons. The two retired police officers are per diem employees that do not enjoy the same terms and conditions of employment as the regular security officers. They have been employed at the Respondent since September 2001, and up until the period before the election mainly worked a 5:00 p.m. to 1:00 a. m. shift in and around the emergency room where they sign-in and sign-out. Plinio decided to increase there presence during the Union election campaign and effective January 1, assigned the two officers to the day shift, with both of them working the same days. During this period, Plinio instructed them to make rounds throughout the hospital during the course of their shifts.

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Plinio testified on cross examination that in the absence of two female secretaries that answer the telephone during the day shift, a security officer is posted in the office to respond to telephone inquiries during the evening shift on a 24/7 basis. All of the guards assigned to Plinio's staff must wear a Hospital ID badge with a photo picture. The badge states, Security-Community Medical Center.

Agency Status of the Security Guards

The Board and the Courts have uniformly held that whether someone acts as an agent under the Act must be determined by common law principles of agency. See, e.g. *NLRB v. Plasterers & Cement Masons Local 90 (Southern III. Builders Ass'n)*, 606 F.2d 189 (7th Cir. 1979), *enforcing* 236 NLRB 329 (1978).

Applying these principles, I find for the following reasons that the regular Security guards and those dressed in all dark uniforms were agents of the Employer at all material times and particularly during the critical period between August 30, 2006 and January 11.

First, I note that the Security guards dressed in all dark uniforms were hired by Plinio in September 2001, and have been stationed in the emergency room since that time to provide security. Second, Plinio transferred these Security guards to areas of the hospital other then the emergency room and increased there presence particularly during the critical period. Third, I also find that when Gural telephoned the Security office on January 5 to inquire about the Security guard dressed in black that was in the intensive care unit, she was following outstanding instructions to contact the Security office at the telephone number posted in the Unit to report emergency situations. Thus, any statements made by a Security officer who answered the telephone are binding on the Employer. Fourth, Ruiz credibly testified that she personally observed Plinio consult with the Security guards dressed in black and observed Plinio accompanying them and the regular security guards on there rounds throughout the hospital, a fact not denied by Plinio. Additionally, Ruiz testified that upon arriving with Conklin at the hospital on January 9 for the pre-election conference, Plinio was waiting at the front door with a Security guard dressed in black and informed her that this is the guard assigned to escort them to the conference room. Both Plinio and the Security guard walked closely behind Ruiz and Conklin on there way to the pre-election conference. This was not denied by Plinio.

Based on the forgoing, I find that any statements or acts of surveillance undertaken by the regular Security guards and those dressed in all dark uniforms can be attributed to the Employer.

b. Discussion

The Board applies an objective test in evaluating party conduct during an elections critical period, i.e. whether the conduct has the "tendency to interfere with the employees"

freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool* & *Mfg. Co.*, 316 NLRB 716 (1995).

In Sands Hotel & Casino, 306 NLRB 172 (1992), the Board held that the respondent engaged in unlawful surveillance by posting one or two security guards near the employee entrance and another security guard with binoculars in an upstairs hotel room in order to observe employees and union agents soliciting union authorization card signatures across the street form the hotel. It further found that the posting of the guard with binoculars constituted more than ordinary or casual observation of public union activity particularly in the absence of safety or property concerns.

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Applying these principles to the subject case, I find that the transfer from the emergency room of the armed security guards dressed in black to patrol the individual units looking for "Union people" constitutes activity out of the ordinary and has the tendency to unreasonably chill the exercise of employees' section 7 rights. Likewise, I find that the Employer's use of armed security guards in the Units, particularly in the absence of any evidence that the employees posed a security threat or were dangerous, is out of the ordinary conduct and had the tendency to chill employee rights. Accordingly, I recommend that such conduct undermined the laboratory conditions during the critical period and is objectionable conduct. On the other hand, I do not find that Reynolds told Gural that the guard was on the Unit looking for "Union persons". In this regard, Reynolds had an excellent command of the facts and answered questions in a crisp and confident manner. She has known Gural for over 20 years and knew that she was a strong supporter of the Union. Under these circumstances, I do not find that her testimony was contrived and conclude that Gural first raised the question about whether the quards were looking for Union organizers and Reynolds responded in a non-coercive manner with information that the guards had been on staff since September 2001, and were not spying on Union organizers. Thus, Reynolds did not interfere with the Union's attempt to organize the employees.

As it concerns the statement of Rosen that she was looking for intruders, I do not find it to be objectionable conduct. In this regard, Gural testified that Rosen informed her that she was looking for teenagers in the Unit who allegedly damaged hospital property. Under these circumstances, the use of the word "intruders" is unrelated to the union activities of employees who were distributing campaign literature on the Unit or in employee lounges. Likewise, I do not find that Rosen removed Union campaign literature as Gural was unable to conclusively establish that the flyers in her hand were "Union flyers." Lastly, I do not find that Boccellatto removed Union campaign literature from the employee lounge as Gural was unable to establish with a degree of certainty who removed the campaign literature.

On the other hand, I find the conduct of Holden in refusing to give the Union organizers the access code to enter the employee lounge and refusing them permission to distribute campaign literature any place in the Unit is inherently destructive of employee rights and constitutes objectionable conduct. I base this finding on the incredulous testimony of Holden who denied that she was wearing a "Vote No" button on her uniform when the weight of the evidence is to the contrary including the testimony of Employer witness Yessin who was certain that Holden was wearing a "Vote No" button on her clothes when he saw her in the coffee shop around 8:30 p.m. that evening, a period of time close to Holden's discussion with Seal and Mathis earlier that same evening. Moreover, I do not credit Holden's testimony that the individuals were wearing coats as it is inconceivable to me that Seal and Mathis would have there coats on while they were distributing literature in numerous Units inside the hospital. Indeed, there testimony that they were not wearing coats and had their identification badges on their clothes while conversing with Holden, and that they continued to openly wear there

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identification badges later that evening in the coffee shop, has a ring of truth to it. Additionally, they would have needed to show their hospital identification at the guard podium on the first floor in order to obtain entrance to the employee lounges on the floors above the lobby. Lastly, I find that the Employer regularly tolerated the selling of commercial items in non-patient care areas of the hospital, and Holden's refusal to permit the distribution of campaign literature by the employee Union organizers is inconsistent with this practice and is therefore, disparate.

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In summary, I recommend that Objection Number 1 should be sustained based on the Employer's conduct found above that interfered with the laboratory conditions during the critical period.

Objection Number 2

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With respect to Objection 2, the Petitioner submitted evidence to the Regional Director indicating that on or about January 6, Employer Administrator Jim Strong followed several employees as they placed Union literature in employee lounges, including the lounge in Unit 3E, and that he removed the literature. Petitioner also submitted evidence indicating that on or about January 11, Employer representative Brent Yessin questioned employees concerning their union activities and then attempted to follow them as they distributed Union flyers. The Employer then removed the flyers from non-work areas.

a. Facts

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Suzanne Czech, a registered nurse and member of the Union's organizing committee, testified that on January 4, she along with fellow nurses Smith, Hucker, Catherine Heuschkel and Mary Petro distributed Union flyers in employee lounges including the first floor one west lounge.

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According to Czech, while the group was still on the first floor, anti-union consultant Yessin walked out of the "war room" and asked Heuschkel questions such as "Who she was", "Was she working", "Was the nurse she was talking with still working", "What did both of you discuss". Czech further stated that Yessin began to follow the group of nurses down the hallway and stated, "I think I will take a tour of the hospital with you".

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On January 5, Czech testified that the same group of nurses distributed flyers in employee lounges including the lounge in Unit 3E. After they had placed the flyers in the lounge, Czech observed an individual talking to Unit Director Margaret Kluin. As the man finished talking to Kluin, he pointed to the hall and she nodded yes. The group started to walk away but observed the man walk into the employee lounge. They then decided to enter the lounge. Czech testified that the entire group observed the man taking down flyers from the wall and holding them in his hand. Czech observed that the man was wearing an identification badge that had the name of James Strong. According to Czech, Hucker asked Strong what he was doing and he replied that he was taking the flyers down. Hucker said, "You know that you are breaking labor laws by removing our information during a campaign and you have no right to remove them as we do not remove your literature". Hucker held out her hand and asked for the flyers back. Strong handed the flyers back to Hucker who noticed additional flyers were hidden in his other hand and she asked for those back also. Strong complied and said, "We have already seen these".

Czeck further testified that she observed Strong following the group while they were distributing flyers in Unit 3E.

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Hucker, a registered nurse since 1979 and a member of the Union's organizing committee, was in the group of employees that Czech testified about who were distributing Union flyers on January 4 and 5. Hucker testified that there was a heightened amount of security that was visible in the weeks leading up to the January 11 election. She stated that when Union organizers were distributing flyers they were frequently stopped and questioned by security personnel but when on duty and not distributing campaign literature they were not stopped.

Hucker testified credibly and in the same manner as Czech concerning both incidents involving Strong and Yessin. With respect to the confrontation with Yessin, Hucker recalls that Yessin in a loud voice asked Heuschkel "Are you talking Union and are you off the clock". Hucker suggested that the group end the discussion with Yessin and they started to walk down the one west corridor toward the elevators. Hucker testified that Yessin stated "I think I will go on a hospital tour with you girls and see what you are doing tonight," and he made the statement two or three times. Hucker confirmed that Yessin followed the group to the elevators, a distance of approximately 60 feet, but did not attempt to get on the elevator with them.

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Hucker asserted that she felt intimidated by Yessin's actions, began crying, and telephoned her husband. She remained on the cell phone with him until she safely reached her car in the parking garage.

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Concerning the incident with Strong on January 5, Hucker confirmed that when the group confronted Strong in the employee lounge with the Union flyers in his hand, she was the one who asked him a number of questions and told him that he was breaking the law by removing the flyers during an election campaign. Hucker asked that the flyers be returned to her and Strong complied.

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Yessin vaguely remembers seeing a number of individuals on the one west hallway on or about January 5, however, he has no recollection of asking them any questions or making comments about there presence in the hospital.

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b. Discussion

There is no dispute that Yessin and Strong were hired by the Employer to coordinate the anti-union campaign at the hospital. The consultants were provided an office on the one west hallway that was referred to as the "war room" and wore badges bearing the name of the facility and the title "Administrator" that permitted unfettered access to the hospital including employee work areas, staff lounges, and patient care areas.

I fully credit the testimony of Czech, Heuschkel, and Hucker who in detail fashion described the actions of Yessin and Strong in following Union organizers when they distributed campaign literature in non-patient care areas of the Hospital including employee staff lounges and interrogated employees about their union activities. Moreover, the testimony that Strong entered the Unit 3E employee lounge and removed campaign literature that had been placed there earlier by the organizers has a ring of truth to it and was not denied by Strong. Likewise, the above testimony that Yessin followed the employees for approximately 60 feet to the main lobby elevators after they distributed campaign literature and interrogated them about there union activities, has a tendency to interfere with employee section 7 rights and was not denied by Yessin.

For all of the above reasons, I recommend that the Board find that the actions of Yessin and Strong in interrogating employees about their union activities, following and surveilling

them, and removing literature from employee lounges is conduct that destroyed the laboratory conditions during the critical period and should be sustained. *Peck Incorporated*, 269 NLRB 451, 459 (1984), *Eaton Technologies*, *Inc.*, 322 NLRB 848, 853-854 (1997).

Objection Number 3

The Petitioner asserts that in the week's leading up to the January 11 election, Ruiz and Conklin were persistently followed by armed security guards. In addition, Ruiz and Conklin were persistently escorted around the facility by the Director of Security who is normally stationed in an office. Ruiz and Conklin were granted access only to the first floor coffee shop and the first floor rest rooms. When they would go to the rest rooms, the armed guards would wait for them outside the door.

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a. Facts

Ruiz, as the lead organizer in the election campaign that commenced in March 2006, routinely held organizing committee meetings and general meetings for employees to explain the benefits of union representation and respond to questions raised by the registered nurses. Ruiz and Conklin normally met with employees in the coffee shop preferring the booths against the wall by the windows. On a number of occasions, Ruiz credibly testified that she observed Rosen, Peraino, Yessin, and Strong looking into the coffee shop from the one west corridor across the courtyard. When the windows are not covered by blinds, it is possible for those standing in the one west hallway to identify individuals who are sitting in the booths conversing with Ruiz and Conklin.

Ruiz compared and contrasted the uniforms of the guards stationed inside the hospital near the elevators with the guards dressed in all black that became more visible during the last two weeks before the election. The guards in black frequently followed employees when they were distributing Union flyers and often remained in the coffee shop for periods up to an hour while observing Ruiz and other nurses conversing in the booths.

On January 9, when Ruiz and Conklin arrived around 5 p.m. for the pre-election conference, Plinio met them at the front entrance. He informed Ruiz and Conklin that the guard dressed in black would escort them to the conference room and both Plinio and the guard walked behind them until they reached that location. On the way to the conference, Ruiz walked by a number of registered nurses who observed Plinio and the guard walking behind her.

Approximately two weeks before the election, when Ruiz and Conklin arrived at the facility, Ruiz overheard one of the regular Security guards get on the radio and call "Code Red". Ruiz opined that this referred to the red jackets that she and Conklin always wore at the facility with the Union emblem. Ruiz noticed that after she heard the "Code Red" announced on the radio that two or three Security guards would patrol in front of the coffee shop while they were inside. Conklin also testified that both the regular Security guards and those dressed in black would frequently look inside the coffee shop and on occasions would remain in the coffee shop for periods up to an hour.

Ruiz testified that between January 1 and 11, the Security guards dressed in black followed her and Conklin on at least five occasions to the first floor rest room and remained outside until they exited. Ruiz further stated that no one else other then the Union organizers were escorted to the rest room nor did the Security guards follow nurses once they passed the guard station in the lobby unlike the Union organizers.

b. Discussion

The record is replete with testimony, and in particular during the period between January 1 and 11, that Security guards dressed in black surveilled and followed Union organizers including Ruiz and Conklin. Indeed, on at least five occasions during the above period armed Security guards dressed in black followed Ruiz and Conklin to the restroom and remained posted outside until they exited.

As it concerns the Petitioner's allegation that Plinio persistently followed Ruiz and Conklin around the facility, the evidence does not support this allegation. Rather, Ruiz testified that when she arrived for the pre-election conference on January 9, Plinio met her at the front door and informed her that the guard dressed in black would escort her to the pre-election conference room. The evidence discloses that in order to reach the conference room, one would have to pass the Security station by the main elevators and then proceed past the elevators to the conference room. This was the only time that Plinio escorted Ruiz and Conklin in the facility, and under these circumstances I do not find that this one time event constituted surveillance.²¹

With respect to one of the regular Security guards calling "Code Red" on the radio, I find that the resulting conduct flowing from this alert constituted surveillance by the Employer. In this regard, immediately after the "Code Red was announced, two or three Security guards including those dressed in black uniforms followed Ruiz and Conklin and remained outside the coffee shop while they were inside. On a number of occasions, the Security guards would remain in the coffee shop for periods in excess of an hour and were able to observe who Ruiz and Conklin were conversing with. While the Employer raised the inference that a "Code Red" could refer to a fire or a scheduled drill, the evidence does not support there position. In this regard, Ruiz credibly testified that on the two occasions that she heard the "Code Red" announced on the radio by the Security guards, no alarm or lights went on in the facility, no one was evacuated from the coffee shop or the hospital and no announcements were made over the public address system regarding an emergency or that a fire or alarm had been sounded. Under these circumstances, I find that the "Code Red" announcement was solely to alert those in radio contact that the Union organizers who wore red jackets with the Union emblem were in the hospital and heightened security should be initiated including patrolling past and entering the coffee shop.

Accordingly, I conclude that during the last several weeks leading up to the election, the Employer increased its security presence in the hospital by directing both the regular and the Security guards dressed in black to follow and engage in surveillance of the employee Union organizers and also Ruiz and Conklin. Therefore, I find that the Employer's use of armed security guards to follow and closely monitor the presence of the Union organizers, individually and while interacting with bargaining unit employees, was contrary to the Employer's normal usage of security and constitutes unlawful surveillance that undermined the laboratory conditions for the election. *Flexsteel Industries, Inc.,* 311 NLRB 257 (1993), *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999).

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²¹ Ruiz admitted in her testimony that she was not routinely given access to the conference room or the auditorium as both of these locations were beyond the guard station adjacent to the main elevators.

In summary, I recommend that Objection Number 3 should be sustained.

Objection Number 4

The Petitioner asserts that approximately two days prior to the election, Ruiz and Conklin were in the first floor coffee shop with two bargaining unit committee members. A group of Employer management employees entered the coffee shop and occupied several booths. Yessin arrived shortly thereafter, and after conversing with the Employer representatives, walked over to the Union booth and asked "How many NYSNA hospitals are closing in New York?" Yessin then stated that he knew Ruiz and Conklin but he did not know the two bargaining unit committee members and asked them their names. Yessin stated that it is always good to know names. At the time that Yessin made these statements the coffee shop was full and approximately seven registered nurses observed the conversation.

a. Facts

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Ruiz testified that she and Conklin were in the coffee shop on January 9, and around 7 p.m. provided flyers to a number of the Union organizers including Seal and Mathis. After distributing the flyers, Seal and Mathis returned to the coffee shop around 8:00 p.m. and joined Ruiz and Conklin in the Union booth. Ruiz and Conklin testified that Seal and Mathis informed them that Holden refused to provide the access code to the Unit 3A employee lounge and prevented them from distributing flyers anywhere on the Unit. They were particularly upset as Holden visibly displayed a "Vote No" button but still refused them the right to distribute flyers in the employee lounge. Ruiz had also observed that Holden regularly wore a "Vote No" button and Holden had previously informed Ruiz that she did not believe in unions.

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Shortly after Yessin arrived in the coffee shop and finished conversing with Employer representatives Rosen, Peraino, and Holden, he came over to the Union group and stood at the end of their booth. He said, "Can I get you a cup of coffee?" The Union group attempted to ignore him. Yessin then said, "Aren't there five NYSNA hospitals closing in New York right now?" According to Ruiz, Yessin was speaking in a loud voice and she observed not only the Employer representatives listening to the conversation but also other registered nurses who were sitting nearby. Conklin told Yessin that we are trying to have a private conversation and could you leave us alone. Yessin walked over to the other end of the booth and said that while he knew Ruiz and Conklin, he did not know the other two bargaining unit committee members. He proceeded to ask Seal and Mathis there names on two or three occasions. Mathis asked Yessin, "Why do you need to know our names?" Yessin said, "It's always good to know names." Ultimately, both Seal and Mathis provided Yessin their names.

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Because Ruiz and the other organizers felt surrounded, they left the coffee shop. Ruiz and Conklin testified that as they left the coffee shop, they were followed by two armed security guards dressed in black to the benches in front of the hospital. The security guards remained ten feet behind and maintained that distance until the group reached the benches.

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Seal and Mathis testified in a similar manner to Ruiz and upon returning to the coffee shop informed Ruiz and Conklin of their frustration in not being able to access the employee lounge in Unit 3A due to Holden's refusal to provide the access code. Seal noted that she observed Rosen and Peraino in one of the booths when she arrived and that Yessin came to the Union booth approximately two minutes later and asked Ruiz how many NYSNA hospitals are closing in New York. Seal and Mathis testified that Yessin asked for their names on two or three occasions but they were surprised that he did so as they both were wearing their identification name tags that were clearly visible and both Rosen and Peraino knew their names.

Yessin admitted that he was in the coffee shop on the evening of January 9, and engaged in conversation with the Union representatives. In this regard, Yessin acknowledged that he asked the group "How many NYSNA hospitals have closed in New York" and inquired about the names of the other two individuals in the booth as he did not know who they were. He testified that he did not see any form of identification on there person. Yessin stated that in response to some of his questions and statements that he directed at the Union organizers, Ruiz told him to research it himself and uttered profane language on several occasions.

Registered Nurse, Nancy Vaccaro, who was in the coffee shop on the evening of January 9, testified that although she did not hear any of the individual conversation that occurred between Yessin and the Union organizers, she specifically recalls that Ruiz on at least one occasion used profanity when responding to a comment made by Yessin. She described Ruiz to be angry and the profane remark was made in a loud manner. Yessin also testified that the tone of Ruiz's comments were hostile and were made in a loud volume.

Rosen testified that she went to the coffee shop on January 9 around 8:30 p.m. and after ordering and receiving her food, sat in a booth alone. Shortly thereafter, she saw Ruiz and Conklin along with two other individuals enter the coffee shop and sit at a nearby booth. Because she felt somewhat uncomfortable, in part due to an earlier incident with Union representative Maria Flores, she telephoned Yessin and requested that he come to the coffee shop. Yessin came into the coffee shop and bought several cups of coffee. Since Rosen had already purchased coffee, Yessin asked if the Union organizers wanted some coffee. According to Rosen, she heard Ruiz respond to Yessin with profane language. Rosen further testified that Yessin asked the Union organizers if any NYSNA hospitals were closing in New York and then stated that while he knew Ruiz and Conklin, he did not know the names of the other two individuals at the table and introduced himself to them. Rosen also requested Yessin to inquire of Ruiz whether she thought it was ethical for Rosen, Peraino and Ruiz to remain in a legal consulting business together. According to Rosen, after Yessin asked the question, she heard Ruiz reply with a barrage of profanity.

30 b. Discussion

I find that the conduct of Yessin went beyond the bounds of normal conversation and under the circumstances constituted harassment and surveillance. In this regard, Yessin spoke in a loud manner when he came over to the Union booth and could be heard by not only the Employer representatives sitting in an adjacent booth but also by other registered nurses that were in the coffee shop. There was no reason for Yessin to ask Ruiz and Conklin "How many NYSNA hospitals were closing in New York" other then to provoke and harass them. I also find that when Yessin asked Seal and Mathis for their names on two or three occasions when each visibly displayed their name tags and were known to Rosen and Peraino that he engaged in harassment. Additionally, I find that when the Union organizers left the coffee shop, the fact that they were followed outside by two armed security guards constitutes surveillance. While I do not condone the profane language uttered by Ruiz during the exchange with Yessin, it is evident to me that she was provoked. In any event, it is the conduct exhibited by Yessin and other Employer representatives that must be evaluated in determining whether the laboratory conditions during the critical period were destroyed rather then the conduct of Ruiz or other Union officials.

Accordingly, I find that the underlying conduct found above interfered with the laboratory conditions of the election and recommend that this objection be sustained. *Teksid Aluminum*

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Foundry, Inc., 311 NLRB 711 (1993), Department Store, Division of Dayton Hudson Corporation, 316 NLRB 85 (1995).

Objection Number 5

The Petitioner asserts that on the day of the election, the Employer posted a printed sign entitled "Election Day Information" on an easel at the main entrance to the facility. The sign advertised free parking and child care for those voting in the union election, and the bottom left-hand corner of the sign contained the words, "Vote No," with a graphic of a box with a check mark in it.

a. Facts

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The parties do not dispute that the Employer posted a sign advertising free parking and child care services for those employees voting in the election (Pet Exh. 2). Ruiz and Czech credibly testified that the two by three foot sign was posted in the entrance of the hospital lobby and it was visible to all employees on there way to vote in the election on January 11.

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b. Discussion

In determining whether the Employer's offer of free parking and child care at issue is objectionable, the Board does not inquire into the subjective reactions of the potential recipients of the benefit. The standard is an objective one---whether the challenged conduct has a reasonable tendency to influence the election outcome. When the conduct takes the form of an employer's offer or grant of benefits, the Board is mindful of the "suggestion of the fist inside the velvet glove", i.e. that employees "are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."²² In evaluating the likely effect, the Board takes into account such factors as the size of the benefit in relation to its stated legitimate purpose, the number of employees receiving it, how the employees would reasonably construe the purpose given the context of the offer and its timing.

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The offer of free parking and child care services was not linked in any way to transportation expenses and can be construed as something extra for employees who voted on January 11. Indeed, there is no dispute that all employees who entered the lobby area on there way to the election polling site would walk past the sign that announced these benefits. Thus, it is reasonable to conclude that a large number of the 732 employees who cast a ballot saw the sign posted in the lobby. Significantly, the election sign ended with the admonition that employees should "Vote No." Given this message and in the absence of any link to transportation expenses, I find that employees would reasonably perceive this as a favor from the Employer which the employees might feel obligated to repay by voting against the Union as the Employer requested. In this regard, employees would think twice as to who provided their livelihood and would be inclined to cast their vote for the party providing the benefits.

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In sum, I find that the Employer's offer to pay free parking and offer child care services on the day of the election for those voting including the admonition to "Vote No", constitutes objectionable conduct. *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), *Rite Aid Corporation*, 326 NLRB 924 (1998).

²² B & D Plastics, 302 NLRB 245 (1991), quoting NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964).

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IV. Setting Aside the Election

I find that the January 11 election must be set aside, and a second election ordered. It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election. White Plains Lincoln Mercury, 288 NLRB 1133, 1137-1138 (1988) (the interests of employee free choice require that the unfair labor practice allegations be considered as grounds for setting aside the election even though not specified in the election objections).

Here, the cumulative effect of the three meritorious unfair labor practices and the sustained objections amounts to conduct that is more than de minimis and, therefore, warrants a second election.²³

Conclusions and Recommendations to the Board Conclusions of Law

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- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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²³ The Charging Party/Petitioner in its post-hearing brief and during the course of the hearing requested that the election be set aside and that a bargaining order issue pursuant to NLRB v. Gissel Packing Co., 395 NLRB 575 (1969), due to the totality of the Respondent's conduct that adversely affected the laboratory conditions in the election and undermined the Union's majority status. Under Gissel, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase the coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede the election process." In the latter category of cases, the "possibility" of erasing the effects of past practices and of ensuring a fair election . . . by use of traditional remedies, though present, is slight and . . . employee sentiment once expressed would be better protected by a bargaining order. In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and the position of the individuals committing the unfair labor practices. A Gissel bargaining order, however, is an extraordinary remedy. The preferred route is to order traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. Hialeah Hospital, 343 NLRB 391, 395 (2004).

Applying the above criteria to the subject case, I find for the following reasons that a bargaining order is not appropriate in this case. First, and foremost, the General Counsel who issued the complaint does not seek a bargaining order for the Respondent's violations. Second, of the five unfair labor practices alleged in the consolidated complaint, I found violations in three and no employee lost employment. Lastly, among the three unfair labor practice allegations found meritorious, none of them involved "hallmark" violations of the Act. Accordingly, I find that the coercive effects of the Respondent's conduct can be adequately remedied by the traditional remedy of a new election.

- 3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by directing representatives of the Union to retrieve their vehicles from its parking garage and to leave the parking garage.
- 4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by hiring a former union organizer and assigning him to the campaign in response to the Union without providing assurances to employees that any information received from the former union organizer concerning who supported the union would not be used against them.
- 5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by promising improved terms and conditions of employment, including a "shared governance" concept, in order to discourage employees from selecting the Union as their collective-bargaining representative.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, Community Medical Center, Toms River, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Directing representatives of the Union to retrieve their vehicles from its parking garage and to leave the parking garage.
- (b) Hiring a former union organizer and assigning him to the campaign in response to the Union without providing assurances to employees that any information received from the former union organizer concerning who supported the Union would not be used against them.
- (c) Promising employees improved terms and conditions of employment, including a "shared governance" concept, in order to discourage employees from selecting the Union as their collective-bargaining representative.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its facility in Toms River, New Jersey, copies of the attached notice marked "Appendix." Copies of the notice, on forms

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Continued"

provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 7, 2006.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held on January 11, 2007, in Case 4-RC-21199 be set aside, and that this case be severed and remanded to the Regional Director to conduct a new election when she deems appropriate.

20 Dated, Washington, D.C. March 14, 2008

Bruce D. Rosenstein
Administrative Law Judge

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Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT direct representatives of the New York State Nurses Association (NYSNA) to retrieve their vehicles from our parking garage and to leave the parking garage.

WE WILL NOT hire former union organizers and assign them to our campaign in response to NYSNA or any other labor organization without providing assurances to you that any information received from the former union organizers concerning who supported the Union would not be used against you.

WE WILL NOT promise you improved terms and conditions of employment, including a "shared governance" concept, in order to discourage you from selecting NYSNA or any other labor organization as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, during any union organizing campaign, notify you if we have hired former union organizers and have assigned them to our campaign opposing NYSNA or any other labor organization and WE WILL provide assurances to you that any information received from the former union organizers concerning who supports NYSNA or any other labor organization will not be used against you.

| | | Community Medical Center | | |
|-------|----|--------------------------|---------|--|
| | | (Employer | -) | |
| Dated | Ву | | | |
| | | (Representative) | (Title) | |

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's

Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
615 Chestnut Street, One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106-4404
Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.